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No. 93-31

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1993

DON N. WEST,

Petitioner,

vs.

BUFFALO CENTER-RAKE
SCHOOL DISTRICT, BY ITS
BOARD OF DIRECTORS,

Respondent.

ON PETITION FOR WRIT OF
CERTIORARI FROM THE COURT
OF APPEALS OF IOWA

BRIEF IN REPLY TO BRIEF IN OPPOSITION

MARK S. SOLDAT
COUNSEL OF RECORD
714 East State Street
Algona, Iowa 50511
(515) 295-9463

MARY JANE WHITE
405 West Main Street
Waukon, Iowa 52172
(319) 568-3551

ATTORNEYS FOR DON N. WEST

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REPLY ARGUMENT

I. PETITIONER WEST DID PRESERVE IN THE STATE COURTS HIS CONSTITUTIONAL CHALLENGE TO SECTION 279.24, CODE OF IOWA.

In its brief, pp. 2-3, the school contended that West had not preserved his challenge that section 279.24, Code of Iowa, "was invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants [West] to protect themselves [himself] against [an] arbitrary and discriminatory... " termination of his superintendent contract. *Giaccio v. State of Pennsylvania*, 86 S.Ct. 518, 519, 383 U.S. 399, 400 (1966). West respectfully disagrees.

Under section 279.24, Code of Iowa, the first judicial review afforded a superintendent is by appeal to the Iowa district court. West took and exhausted

such an appeal. During that appeal, West preserved the following positions in his brief:

Division VIII

THE TERMINATION PROCEDURES IN SECTION 279.24, CODE OF IOWA (1989), ARE UNCONSTITUTIONALLY VAGUE AND THUS VOID.

Section 279.24, Code of Iowa (1989), establishes that there is a standard upon which the decision to terminate must be made. This standard arises from the statutory language specifying that there must be "specific reasons" stated "for" it. *Id.* In the case of "administrators, except superintendents", the standard is "for just cause". In the case of superintendents, the standard is "for" a standard not enunciated.

The United States Supreme Court has dealt with a similar statute. *Giaccio v. State of Pennsylvania*, 86 S.Ct. 518, 382 U.S. 518 (1966). In that case, a Pennsylvania statute directed a jury which had acquitted a defendant to "determine, by their verdict, whether the county, or prosecutor, or the defendant shall pay the costs... " S.Ct. at 519, U.S. at 400. The statute offered no standard under which to make this determination.

Responsively, the United States Supreme Court declared this statute "invalid under the due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory imposition of costs." *Id.*, at 530, U.S. at 402. It held the standards were insufficient because the statute "contains no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs... " *Id.*, S.Ct., at 521, U.S. at 403.

Here, the same problem exists within section 279.24. A school board is directed to determine whether or not a contract shall continue or discontinue. It is even required inceptively to give specific reasons to be considered "for" discontinuance. However, it is not given any standard by which to locate the demarcation. School board members impermissibly "must make determination of the crucial issue upon their own notions of what the law should be instead of what it is." *Giaccio, supra*, S.Ct. at 521, U.S. at 403. Therefore, the termination procedures of section 279.24 are void for vagueness, and West's automatic renewal, which is severable, *see*, §4.12, Code of Iowa (1989), cannot be terminated.

Division IX

THE SCHOOL BOARD APPLIED A NON-EXISTENT OR UNDEFINED STANDARD TO THE FACTS TO CONCLUDE THAT IT SHOULD TERMINATE THE AUTOMATIC RENEWAL OF WEST'S CONTRACT.

In its proposed decision submitted to the ALJ, pp. 11-12, the Board wrote:

> A School Board's decision for non-renewal of a Superintendent's contract only requires the reasonable foundation to terminate. Iowa Code Section 279.24; *I.A.S.B. Certified Employee Contract Termination Procedure*, p. 167 (1989), *Wedergren v. Board of Directors*, 307 N.W.2d 12, 20 (Iowa 1981).... The reasonable foundation test... is less stringent than the just cause standard...

West has examined the section 279.24 and *Wedergren* citations. After doing so, he has found neither the term "reasonable foundation", nor any indication of what "reasonable foundation" might mean, nor any indication that such "test... is less stringent", nor any indication that the standard to be applied should be "less stringent".

In his proposed decision, p. 27, the ALJ adopted the Board's standard and citations. He did not further expand them, but did quote from just

cause language before stating that: "Although this is not a 'just cause' case, it is clear that a School Board has the final say as to how best to resolve a disruptive situation provided there is a reasonable basis for their decision." [*emph. supp.*] This statement too is unsupported by citation.

In rebuttal, West argues that without authoritative foundation and on its face, the standard applied to the facts of this case neither exists nor has any meaning. As just one example of the difficulties in application, West asserts that it cannot even be ascertained from the Board decision whether "reasonable" means reasonable to an average citizen, reasonable to an educational professional, reasonable to an average school board member, or reasonable to some other benchmark person. Therefore, the Board's decision minimally has been "[a]ffected by... error of law." §279.24(5), Code of Iowa (1989).

To some extent, of course, this argument is much like repeating the argument in the preceding division. That is, no one had any way of knowing what the standard was. Consequently, the Board and the ALJ could not possibly have been expected to apply one with any meaning and thus by ad hoc and murky rationale, just applied "their own notions" of an appropriate standard.

Giaccio, supra, S.Ct. at 521, U.S. at 403. The difference, however, is that in this division, West does not argue that the statute is void, but rather that the Board erred by applying a standard with no meaning, with no lawful base, or both. 2/15/92 second revised appellant's brief, pp. 236-240, record of the Iowa district court for Winnebago County.

In its 8/1/91 judgment on appeal, the district dismissed the quoted West positions in exactly the same manner that the school has done in its brief, p. 3. Both the district court and the school did so by "talking around" the West positions without ever meeting them "head on". [*See*, app., pp. 73-76.]

The precise manner by which they "talked around" these positions was to define a just cause standard, [even though they admitted it was not applicable to West under the plain language of section 279.24], to hold that the just cause standard was met, and

then, without more, to hold that the reasonable foundation standard also was met. Thereby, they sidestepped explanation of what the reasonable foundation standard was, except by repetition of what the statute already had stated it was not, namely the just cause standard.[1] In other words, they utterly failed to cure the "vagueness" defect arising from the complete "absence of [a legislatively-stated] standard" in section 279.24 by supplying a judicially-defined standard. *Giaccio, supra*, S.Ct. at 520, U.S. at 402.

Following the district court's decision, West appealed to the Iowa supreme court. In his 4/92 appellate

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[1] In its brief, p. 3, of course, the school went one step further than the district court ever did, [*see*, app., pp. 73-76], by claiming that the just cause standard was a "higher" standard than the undefined reasonable foundation standard.

court brief, West abbreviated, yet renewed his district court positions as follows:

> When section 279.24, Code of Iowa, the Board, and the trial [district] court permitted termination of West's continuing contract without any "standards at all" for doing so, but rather "upon their own notions of what the law should be... " they did not afford the requisite constitutional due process. *Giaccio v. State of Pennsylvania*, 86 S.Ct. 518, 521, 383 U.S. 399, 403 (1966). Because they never did, [despite invitation to do so], it is very dubious that either the Board or the trial [district] court ever could articulate the meaning of "reasonable foundation". *See*, app., p. 312. Therefore, it surely was fundamentally unfair to force West to defend against an unknown. [app., pp. 280-281.]

Following this briefing, the Iowa supreme court transferred West's appeal to the Iowa court of appeals. In its decision, the Iowa court of appeals effectively adopted the district court's approach of "talking around" the definition of the "reasonable foundation"

standard fabricated from thin air. [app., pp. 22-27.] Accordingly, West applied to the Iowa supreme court for further review, thereby stating *inter alia* as follows:

> *First Impression - Lack of Termination Standard.* In the sixth unnumbered paragraph of section 279.24, Code of Iowa, the legislature left the superintendent termination standard to conjecture:
>
> > The notice shall state the specific reasons to be used by the board for considering termination which for all administrators except superintendents shall be for for just cause. [*emph. supp.*]
>
> Believing that this provision impermissibly left the standard to the decisionmakers' "own notions of what the law should be... " *Giaccio v. State of Pennsylvania*, 86 S.Ct. 518, 521, 383 U.S. 399, 403 (1966), West challenged whether this statute could be applied to him at all.

Once more, the appeals court in its opinion, pp. 13-14, sidestepped an issue. It did so by holding that since West had been afforded some of the incidents of due process, he had not been denied due process. The blatant defect in this conclusory

> resolution, however, was that just because some incidents of due process were provided hardly meant that all incidents were provided. Patently, neither West, nor the persons who sat in judgment of him ever knew what the applicable standard was for reaching the termination judgment....
>
> Nevertheless, be it by constitutional or statutory due process, the following questions presented should have been and should now be confronted...: Should section 279.24 be declared inapplicable to superintendent contracts because it lacks the due process of an overt standard upon which to make the termination decision? 2/18/93 application for further review, pp. 13-15, record of the Iowa supreme court.

West does not disagree that the Iowa supreme court should have retained the appeal pursuant to Rule 401(b), I.R.A.P., [or at least further reviewed it], or should have certified the constitutional challenge for statutory vagueness pursuant to Rule 460, I.R.A.P. However, West does disagree that the failure by the Iowa courts to recognize and confront

this constitutional challenge can be laid at his doorstep. Unlike the petitioner in the school's cited authority, *Beck v. Washington*, 82 S.Ct. 955, 960-962, 369 U.S. 541, 549-554 (1962), West preserved the constitutional challenge to section 279.24. The Iowa courts simply failed to respond.

Indeed, the repeated failures by the Iowa courts to confront the federal question embodied in this constitutional challenge constitute one of the very reasons certiorari should be granted.

II. PETITIONER WEST HAS NOT ASKED THIS COURT TO PERFORM AN EXTENSIVE REVIEW OF THE EVIDENTIARY RECORD.

Without identifying the basis for the same, the school argued in its brief, pp. 3-4, that West has asked this Court to make an extensive evidentiary review of fact issues. In reply, West notes

that he has requested the Court only to review the terse and virtually-uncontroverted evidence that: (a) before decisionmaking, a majority of the decisionmakers testified into the 3/90 hearing record, [the record upon which their decision later had to be foundationed], that they had formed the opinion that the termination charges against West were true; (b) before the charges ever were brought, on 11/28/89, a majority of the decisionmakers advised West of their prejudgment that they would terminate his superintendent contract; (c) before the charges ever were formulated, in the summer of 1989, two of the decisionmakers campaigned upon prejudgment representations that they would terminate West; and (d) two of the decisionmakers had to adjudge the charges of personal aspersions alleged to have

been made by West against them.

Unlike the petitioner in the school's cited authority, *United States v. Johnston*, 45 S.Ct. 496, 497, 268 U.S. 220, 227 (1925), West hardly has requested that this Court review whether the record evidence supported the charges brought against him. Rather, he has requested much more narrowly that this Court review whether evidence in the record reflected an unacceptable risk of bias on the part of the decisionmakers. In the past, this Court has granted such requests and made such reviews. *E.g.*, *Marshall v. Jerrico*, 100 S.Ct. 1610, 446, U.S. 238, 64 L. Ed.2d 182 (1980); *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 96 S.Ct. 2308, 426 U.S. 482, 49 L.Ed.2d 1 (1976); *Withrow v. Larkin*, 95 S.Ct. 1456, 421 U.S. 35, 43 L.Ed.2d 712 (1975);

Taylor v. Hayes, 94 S.C.t 2697, 418 U.S. 488, 41 L.Ed.2d 897 (1974); *Mayberry v. Pennsylvania*, 91 S.Ct. 499, 400 U.S. 453 (1971); *In Re Murchison*, 75 S.Ct. 623, 349 U.S. 133 (1955).

III. PETITIONER WEST DID NOT WAIVE IN THE STATE COURTS HIS RIGHTS TO PRESENT THE FEDERAL QUESTIONS DELINEATED IN HIS CERTIORARI PETITION.

In its brief, pp. 4-5, the school cited authority for the proposition that a failure to prepare an appellate appendix in compliance with state rules constituted a waiver of the federal questions in the state courts. In reply, West notes that the cited authority did not stand for that proposition.

In *Parker v. People of State of Illinois*, 68 S.Ct. 708, 709-710, 333 U.S. 571, 573-575 (1948), this Court merely affirmed as "reasonable" a "well-settled

law in Illinois" that a constitutional question pursued in the wrong court constituted a waiver of that question. *Id.* That is, it affirmed a petitioner's "plain choice" of waiver by invoking one procedure known in Illinois to amount to a waiver, over another known in Illinois to permit raising of the constitutional question. *Id.*, S.Ct. at 710, U.S. at 575.

By contrast here, West did not make a "plain choice" to follow a procedure, the known consequences of which was a waiver of the federal questions. At most, he included parts of the district court record in the appendix, [*viz.*, his district court brief], that the appellate court declared should not have been included.

Notably, however, any such "choice" by West did not result in a declaration

by the appellate court that the record itself could or would not be reviewed. Instead, the appellate court necessarily left this record "available" to review: "In designating parts of the record for inclusion in the appendix, the parties shall consider the fact that the entire record is available to the appellate court for examination... " Rule 15, I.R.A.P.; *see also, In Re Marriage of Hunt*, 476 N.W.2d 99, 104 (Iowa 1991). In Iowa, of course, the entirety of the trial court record constitutes the appellate record, regardless of what is included in the appendix. Rule 10(a), I.R.A.P.

Moreover, any such "choice" by West also did not result in a declaration by the Iowa appellate courts that they would not consider the federal questions assigned as error in West's state court

brief. In that regard, such assignments arose from the arguments and citation of authority made in initial state court briefs, *see e.g.*, *Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992); *Moore v. Vanderloo*, 386 N.W.2d 108, 113 (Iowa 1986); *see also*, app., pp. 280-281, and all such assignments in West's initial state court brief were particularly permitted to be filed, app., p. 39. Therefore, although the state appellate courts may have disregarded a portion of West's appendix, they clearly had before them the federal questions preserved and assigned, as well as the supporting record from the prior proceedings.

IV. PETITIONER WEST HAS SOUGHT CERTIORARI TO REVIEW CONTROLLING ISSUES OF FEDERAL LAW.

In its brief, p. 5, the school once again repeated its argument that since it

provided some of the incidents of due process, namely notice of charges and opportunity to respond in a fair hearing before an independent ALJ, therefore, West was afforded due process and no federal question is presented. As usual, however, the school neglected to mention in this argument the fact that West had claimed that other incidents of due process, namely decisionmaking in accordance with a pre-announced and defined termination standard and decisionmakers who were fair and impartial, had not been provided. As a corollary then, the school further neglected to mention that such claims by West did constitute the presentations of controlling federal questions, the state court resolution of which "conflicts with the applicable decisions of this Court." Rule 10.1(c), Rules of the Supreme Court

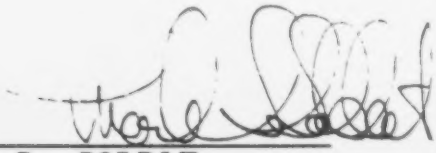
of the United States.

Indeed, West denotes as follows the significant inference flowing from the school's neglect to address the substantive issues raised in West's certiorari petition. In its brief, the school essentially questioned whether West preserved his constitutional challenges to section 279.24 and to the impartiality of the termination decisionmakers. Yet, it never delineated how these challenges, assuming preservation *arguendo*, failed to comprise important questions of federal law. That is, it just never explained why this Court should overlook a statute patently without any standard to be applied by the decisionmaker or why this Court should disregard such acts of impartiality as the decisionmakers testifying to themselves that the charges they had yet

to adjudge were true.

Consequently, West submits that the inference which flows from the fact that the school did not so delineate or explain was that it was not possible for it to delineate or explain. Because important federal questions are extant, the school implicitly had to concede that certiorari should be granted if preservation has been shown.

By: MARY JANE WHITE
Attorney at Law
405 West Main Street
Waukon, Iowa 52172
(319) 568-3551

By: 
MARK S. SOLDAT
COUNSEL OF RECORD
714 East State Street
Algona, Iowa 50511
(515) 295-9463

ATTORNEYS FOR
PETITIONER, DON
N. WEST